

Serial No. 10/068,047

REMARKS

I. INTRODUCTION

In response to the Office Action dated February 27, 2006, please cancel claims 38-46. Entry of these amendments, and re-consideration of the application, as amended, is requested.

II. CLAIM AMENDMENTS

Applicants' have amended the claims as indicated above to accept material indicated as allowed or allowable. The Applicants also intend to file continuation applications claiming the subject matter of claims 38-46.

III. STATUS OF CLAIMS

Claims 1-46 are pending in the application.

Claims 1, 2, 5, 6, 7, 10, 12, 13, 14, 15, 23, 24, 27, 28, 29, 32, 34, 35, 36, and 37 were provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19, 22, 23, 24, 25, 26, 27, 28, 29, and 30 of co-pending application 10/068,039.

Claims 16-22 were allowed.

Claims 3, 4, 8, 9, 11, 25, 26, 30, 31, and 33 were objected to as being dependent upon a rejected base claim, but would be allowable if written in independent form.

The Applicants thank the Examiner for the indication of allowable/allowed subject matter.

IV. DOUBLE PATENTING

On pages (2)-(3), the Office Action provisionally rejected claims 1, 2, 5-7, 10, 12-15, 23-24, 27-29, 32, and 34-37 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 4-12, 19, and 22-30 of co-pending Application No. 10/068,039.

The Applicants hereby submit a terminal disclaimer in compliance with 37 CFR 1.321(c) to obviate this rejection.

Serial No. 10/068,047

V. NON-ART REJECTIONS

On page (4), the Office Action rejected claims 38-46 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Further, on page (5), the Office Action rejected claims 44-46 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention.

The Applicants respectfully disagree with these rejections, to expedite prosecution, the Applicants have canceled these claims, and will address their rejection in a continuing patent application.

In addition, the Applicants respectfully traverse the statement that claims 41 and 44 are in the Jepson format, and thus admit the contents of the preamble as "prior art". First, the claims are not in the Jepson format. 37 C.F.R. 1.75(e) recites:

(e) Where the nature of the case admits, as in the case of an improvement, any independent claim should contain in the following order:

- (1) A preamble comprising a general description of all the elements or steps of the claimed combination which are conventional or known,
- (2) A phrase such as "wherein the improvement comprises," and
- (3) Those elements, steps, and/or relationships which constitute that portion of the claimed combination which the applicant considers as the new or improved portion.

Claims 41 and 44 do not recite a phrase analogous to "wherein the improvement comprises" and is therefore not written in the Jepson format. The words "In the" were used to set the context for the Applicant's invention ... in other words, to introduce terms which were used in the body of the claim in a readable and grammatically correct manner that complied with 35 U.S.C. § 112. As recited in MPEP § 2129 (reproduced below), even if the use of the terms "In the" recited a claim in the Jepson format, this is at best an implied admission of prior art which has been overcome with the statement above.

Drafting a claim in *Jepson* format (i.e., the format described in 37 CFR 1.75(e); see MPEP § 608.01(m)) is taken as an implied admission that the subject matter of the preamble is the prior art work of another. *In re Fout*, 675 F.2d 297, 301, 213 USPQ 532, 534 (CCPA 1982) (holding preamble of *Jepson*-type claim to be admitted prior art where applicant's specification credited another as the inventor of the subject matter of the preamble). However, this implication may be overcome where applicant gives another

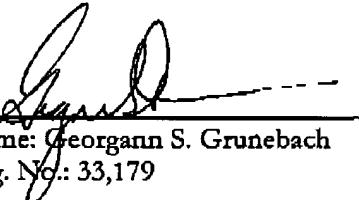
Serial No. 10/068,047

credible reason for drafting the claim in *Jepson* format. *In re Ehrreich*, 590 F.2d 902, 909-910, 200 USPQ 504, 510 (CCPA 1979) (holding preamble not to be admitted prior art where applicant explained that the *Jepson* format was used to avoid a double patenting rejection in a co-pending application and the examiner cited no art showing the subject matter of the preamble). Moreover, where the preamble of a *Jepson* claim describes applicant's own work, such may not be used against the claims. *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, 748 F.2d 645, 650, 223 USPQ 1168, 1172 (Fed. Cir. 1984); *Ehrreich*, 590 F.2d at 909-910, 200 USPQ at 510.

VI. CONCLUSION

In view of the above, it is submitted that this application is now in good order for allowance and such allowance is respectfully solicited. Should the Examiner believe minor matters still remain that can be resolved in a telephone interview, the Examiner is urged to call Applicants' undersigned attorney.

Respectfully submitted,

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